

## OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 09-02

October 21, 2008

TO: All Division Heads, Regional Directors,  
Officers-in-Charge, and Resident Officers

FROM: Ronald Meisburg, General Counsel

SUBJECT: New Federal Rules Protecting Personal Identification  
Information in Court Filings

As you may already know, all federal rules of procedure now require that certain personal identification information be redacted from documents filed with the courts electronically or in paper form. See Rule 5.2 of the Federal Rules of Civil Procedure (FRCP); Rule 25(a)(5) of the Federal Rules of Appellate Procedure (FRAP); Rule 9037 of the Federal Rules of Bankruptcy Procedure (Bankr. Rule), Rule 49.1 of the Federal Rules of Criminal Procedure.<sup>1</sup> This memorandum underscores for all Agency employees the importance of complying with these rules when making court filings.

FRCP Rule 5.2, entitled "Privacy Protection for Filings Made with the Court," and all the other federal rules regulate paper court filings as well as electronic filings, and thus go further than required by the E-Government Act of 2002, which prompted these new requirements.<sup>2</sup>

**FRCP Rule 5.2:** The core provision of Rule 5.2 sets forth required redactions from court filings of personal data identifiers. These required redactions include Social Security and taxpayer-identification numbers, dates of birth, names of minor children, and financial-account numbers. Rule 5.2(a) provides:

(a) Redacted Filings. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification

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<sup>1</sup> The full text of FRCP 5.2, FRAP 25(a)(5), and Bankruptcy Rule 9037 are set forth in the attached Appendix.

<sup>2</sup> The Supreme Court has not issued a formal privacy redaction rule, but it has issued "Guidelines for Electronic Submission of Briefs on the Merits" that require the same redactions discussed herein for both paper and electronic submissions to the Court.

number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

- (1) the last four digits of the social-security number and taxpayer-identification number;
- (2) the year of the individual's birth;
- (3) the minor's initials; and
- (4) the last four digits of the financial-account number.

Rule 5.2(b) sets forth limited exemptions from the redaction requirement. Most relevant to the NLRB is Rule 5.2(b)(2), which provides "[t]he redaction requirement does not apply to . . . the record of an administrative or agency proceeding." Accordingly, there is no requirement that the NLRB redact documents initially made part of the record of the underlying or collateral administrative proceeding and subsequently filed in federal court as an exhibit or as the Agency's record. This exemption does not apply, of course, to documents that the Agency initially creates for filing in a federal district court (e.g., 10(j) proceedings, subpoena enforcement proceedings). Such documents initially filed in district court must conform with the redaction requirements of Rule 5.2(a).

The Advisory Committee Notes to Rule 5.2 provide that the "responsibility to redact filings rests with counsel and the party or non-party making the filing." Thus, the clerk of a court is not required to review documents filed with the court for compliance with the rule. This underscores the NLRB's responsibility to protect the privacy of personal identification information contained in documents filed in the court. Indeed, filing information that should have been redacted under Rule 5.2 could expose the Agency to Privacy Act liability.

Many local court rules also address the protection of private information, and accordingly, should always be reviewed before filing in court. For example, the local rules for the United States District Court for the Western District of Missouri recommend that parties exercise caution when filing documents that contain private information beyond the items listed in Rule 5.2, such as driver's license numbers, medical records, and employment history.

**Federal Rules of Appellate, Bankruptcy, and Criminal Procedure:**

As a practical matter, there is little difference between FRCP 5.2 and the rules applicable in the courts of appeals, the bankruptcy courts, or in criminal proceedings.

*FRAP 25(a)(5)*: This rule provides for application of the privacy protection rule that applied to the case below to govern in the case on appeal, where the case below was governed by FRCP 5.2, Bankruptcy Rule 9037, or Criminal Rule 49.1. Where no such rule applied, as in Board proceedings pending enforcement under Sections 10(e) and (f) of the Act, privacy protection is governed by FRCP 5.2. Accordingly, in such cases, documents created for filing in the United States courts of appeals -- such as appellate court briefs and motions -- must conform with the redaction requirements of FRCP 5.2(a). Where a case in a United States court of appeals began in a district court, such as an appeal in a 10(j) case or subpoena enforcement case, FRCP 5.2 would also apply to all records created for filing in either court.

*Bankr. Rule 9037*: The redaction requirements of this rule are almost identical to FRCP 5.2. However, while Bankruptcy Rule 9037 contains the same exemption for "the record of an administrative or agency proceeding . . ." *this exemption does NOT apply to the record of an administrative or agency proceeding that is "filed with a proof of claim."* Bankr. Rule 9037(b)(2). Accordingly, when filing proofs of claim and attachments, the Regions must be careful to redact identifying information in accordance with Bankruptcy Rule 9037(a).

*Criminal Rule 49.1*: This rule is almost identical to FRCP 5.2, but includes the further requirement to redact an individual's home address to reveal only the city and state.

If court proceedings implicate compliance-related issues such as, for example, the possible institution of contempt proceedings, compliance-related investigative subpoenas, the Right to Financial Privacy Act, or the Federal Debt Collection Procedure Act, questions regarding these new privacy rules should be directed to the Contempt Litigation and Compliance Branch. Questions regarding other court proceedings should be directed to the Special Litigation Branch.

/s/  
R.M.

cc: NLRBU  
Release to the Public

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## APPENDIX

### **FRCP Rule 5.2. Privacy Protection For Filings Made with the Court**

**(a) Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing may include only:

- (1) the last four digits of the social-security number and taxpayer-identification number;
- (2) the year of the individual's birth;
- (3) the minor's initials; and
- (4) the last four digits of the financial-account number.

**(b) Exemptions from the Redaction Requirement.** The redaction requirement does not apply to the following:

- (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
- (2) the record of an administrative or agency proceeding;
- (3) the official record of a state-court proceeding;
- (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
- (5) a filing covered by Rule 5.2(c) or (d); and
- (6) a pro se filing in an action brought under 28 U.S.C. §§ 2241, 2254, or 2255.

**(c) Limitations on Remote Access to Electronic Files; Social-Security Appeals and Immigration Cases.** Unless the court orders otherwise, in an action for benefits under the Social Security Act, and in an action or proceeding relating to an order of removal, to relief from removal, or to immigration benefits or detention, access to an electronic file is authorized as follows:

- (1) the parties and their attorneys may have remote electronic access to any part of the case file, including the administrative record;

(2) any other person may have electronic access to the full record at the courthouse, but may have remote electronic access only to:

- (A) the docket maintained by the court; and
- (B) an opinion, order, judgment, or other disposition of the court, but not any other part of the case file or the administrative record.

**(d) Filings Made Under Seal.** The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the person who made the filing to file a redacted version for the public record.

**(e) Protective Orders.** For good cause, the court may by order in a case: (1) require redaction of additional information; or (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

**(f) Option for Additional Unredacted Filing Under Seal.** A person making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

**(g) Option for Filing a Reference List.** A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

**(h) Waiver of Protection of Identifiers.** A person waives the protection of Rule 5.2(a) as to the person's own information by filing it without redaction and not under seal.

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**FRAP 25(a) (5): Privacy Protection.** An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case."  
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**Bankruptcy Rule 9037: Privacy Protection For Filings Made with the Court.**

**(a) Redacted Filings.** Unless the court orders otherwise, in an electronic or paper filing made with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual, other than the debtor, known to be and identified as a minor, or a financial-account number, a party or nonparty making the filing may include only:

- (1) the last four digits of the social-security number and taxpayer-identification number;
- (2) the year of the individual's birth;
- (3) the minor's initials; and
- (4) the last four digits of the financial-account number.

**(b) Exemptions From the Redaction Requirement.** The redaction requirement does not apply to the following:

- (1) a financial-account number that identifies the property allegedly subject to forfeiture in a forfeiture proceeding;
- (2) the record of an administrative or agency proceeding unless filed with a proof of claim;
- (3) the official record of a state-court proceeding;
- (4) the record of a court or tribunal, if that record was not subject to the redaction requirement when originally filed;
- (5) a filing covered by subdivision (c) of this rule; and
- (6) a filing that is subject to § 110 of the Code.

**(c) Filings Made Under Seal.** The court may order that a filing be made under seal without redaction. The court may later unseal the filing or order the entity that made the filing to file a redacted version for the public record.

**(d) Protective Orders.** For cause, the court may by order in a case under the Code:

- (1) require redaction of additional information; or
- (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court.

**(e) Option For Additional Unredacted Filing Under Seal.** An entity making a redacted filing may also file an unredacted copy under seal. The court must retain the unredacted copy as part of the record.

**(f) Option For Filing A Reference List.** A filing that contains redacted information may be filed together with a reference list that identifies each item of redacted information and specifies

an appropriate identifier that uniquely corresponds to each item listed. The list must be filed under seal and may be amended as of right. Any reference in the case to a listed identifier will be construed to refer to the corresponding item of information.

**(g) Waiver of Protection of Identifiers.**

An entity waives the protection of subdivision (a) as to the entity's own information by filing it without redaction and not under seal.